

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	
Advanced Telecommunications Capability to)	
All Americans in a Reasonable and Timely)	GN Docket No. 10-159
Fashion, and Possible Steps to Accelerate)	
Such Deployment Pursuant to Section 706 of)	
the Telecommunications Act of 1996, as)	
Amended by the Broadband Data)	
Improvement Act)	

COMMENTS OF FREE PRESS

The Commission has embarked on its seventh inquiry to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”¹ The Commission’s sixth inquiry represented a welcome and significant shift away from the predicative claims in its previous decisions towards a more data-driven analysis. With the *Sixth Report*, the Commission correctly found that the deployment of advanced telecommunications capability was not occurring in a reasonable and timely fashion.² While the analysis underlying this determination is not without flaws (see below), it is a correct determination that reflects a more faithful evaluation of the standard established in Section 706. Any reasonable person looking at the current deployment data measured against the language of Section 706 can only conclude that *most* consumers are not receiving the type of Internet capability envisioned by Congress. As it did for the *Sixth Report*, the Commission should once

¹ 47 U.S.C. § 1302(b).

² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future*, Sixth Broadband Deployment Report, GN Docket Nos. 09-137, 09-51, 25 FCC Rcd 9556 (rel. July 20, 2010) (“*Sixth Report*”).

again reject the sometimes desperate attempts made by broadband access providers to convince the agency that deployment is reasonable and timely.³ Denying reality and engaging in a never ending game of shoot the messenger will not bring Americans the quality connections commonly available in many other nations -- only competition and a commitment to the national interest will. Until providers universally offer consumers the types of affordable robust transmission capacity envisioned by Congress more than a decade ago, the Commission has no choice but to once again conclude that advanced telecommunications capability is *not* being deployed to *all Americans* in a reasonable and timely fashion.

I. DISCUSSION

On July 20, 2010, the Commission released the *Sixth Broadband Deployment Report* (*Sixth Report*) concluding that advanced telecommunications capability was not being deployed in a reasonable and timely fashion.⁴ The conclusion was largely based on the finding that “approximately 14 to 24 million Americans remain without broadband access capable of meeting the requirements set forth in section 706.”⁵ This is a welcome departure from previous reports, which were largely based on predictive future developments, some of which proved to be inaccurate.⁶ Instead, with the *Sixth Report* the Commission appropriately reviewed current market data, along with CITI’s more detailed future deployment information, and introduced a

³ Petition for Reconsideration of National Cable and Telecommunications Association, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51 (Aug. 19, 2010).

⁴ *Sixth Report* at para. 2.

⁵ *Ibid* at para. 1.

⁶ See e.g. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, GN Docket No. 04-54, 19 FCC Rcd 20540, p. 22-23 (2004).

more rigorous definition of what speeds are necessary in order to *receive* “advanced telecommunications capability.”⁷

The conclusion of the *Sixth Report* is more than just descriptive however, as the Commission is now required to “take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”⁸ As we explain in more detail below, while connection speeds have improved in the past year, most consumers still do not receive connections that offer users the capability to “originate and receive high-quality voice, data, graphics, and video telecommunications.”⁹ Thus, the Commission should retain Section 706’s grant of authority and undertake actions that will “accelerate deployment” by improving the high prices and slow speeds that are largely a result of minimal competition in the residential broadband Internet access market.

A. The Commission Should Revise the Definition of Advanced Telecommunications Capability to Better Reflect Congressional Intent

At the outset, we applaud the Commission’s move to revise the definition of advanced telecommunications capability from advertised upstream and downstream speeds of at least 200 Kbps to actual speeds of at least 4 Mbps downstream and 1 Mbps upstream.¹⁰ This definition better reflects the capacities necessary to “receive high-quality voice, data, graphics, and video telecommunications.”¹¹ However, in order to more precisely reflect the intent behind Section 706, we believe the Commission should further improve the definition as explained below. At

⁷ *Sixth Report* at para. 11.

⁸ 47 U.S.C. § 1302(b).

⁹ 47 U.S.C. § 1302(d)(1).

¹⁰ *Sixth Report* at para. 5.

¹¹ 47 U.S.C. § 1302(d)(1).

the outset we note that the 4/1 threshold was chosen not based on an interpretation of the Section 706 language, but to reflect what the *current average* speed is of U.S. high-speed Internet connections.¹² The primary purpose of this threshold is for the initial national broadband availability target -- the Commission's Internet speed goal for universal access under a reformed USF. This goal is distinct from the tenets of Section 706. The definition of advanced telecommunications capability offered a wholly different approach that was not meant to ensure every consumer has comparable speed to others. Instead, Congress sought to detail the capabilities that such a service must include. The Commission appears to have misinterpreted this, as the *Sixth Report* states this threshold was chosen to "reflect current demand patterns."¹³ Thus, the premise underlying the model used to determine the threshold is flawed.¹⁴ The Commission should view these two speed thresholds as distinct, regardless of whether this would result in "confusion."¹⁵ Congress provided the Commission with specific instructions as to what capabilities it was referring to and the Commission has a duty to carry out that directive. Choosing the average of what is currently subscribed to is not an appropriate way to implement Section 706 -- if for no other reason than the arithmetical fact that the average is constantly changing, while the statutory language is rightly focused on more static capabilities.

¹² *National Broadband Plan* at 135. ("This represents a speed comparable to what the typical broadband subscriber receives today,").

¹³ *Sixth Report* at para. 12.

¹⁴ *NOI* at para. 12.

¹⁵ *Ibid* at para. 14.

But, even with the current definition, the Commission found that only approximately 44 percent of fixed connections (and 30 percent of total connections) met the 4/1 Mbps threshold.¹⁶

The Commission has asked:¹⁷

[S]hould we revise the [minimum speed threshold] benchmark upward to ensure services meeting this threshold are capable of supporting advanced video services, such as two-way video conferencing and/or streaming high-definition video, which require faster broadband speeds?

The Commission answers their own question in the accompanying footnote, which states the National Broadband Team estimated that “streaming high-definition video requires a connection of at least 5-10 Mbps.”¹⁸ Congress offered clear language that “high-quality...video” must be a functionality included in advanced telecommunications capability. Clearly a 4 Mbps threshold is insufficient to meet those capabilities.

As we reviewed in previous filings, Congressional intent necessitates that this capability allow users to speak, not just be spoken to.¹⁹ Indeed, the National Broadband Plan concluded that the “primary incentive for broadband adoption is communication – two-way

¹⁶ Wireline Competition Bureau, “Internet Access Services: Status as of June 30, 2009,” Industry Analysis and Technology Division, September 2010, p. 4 (“477 Report”); “FCC Releases New Data on Internet Access Services,” Press Release, Sept. 2, 2010.

¹⁷ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Seventh Broadband Deployment Notice of Inquiry, GN Docket No. 10-159, para. 5 (rel. Aug. 6, 2010) (“NOP”).

¹⁸ *Id.* at n. 16. This figure aligns closely with the estimates we offered in comments in the last inquiry. See Comments of Free Press, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, p. 14 (suggesting “a per user minimum of 5 Mbps in both the upstream and downstream directions”) (“Sixth 706 Comments”).

¹⁹ *Sixth 706 Comments* at 7-11. Comments of Free Press, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, pp. 9-12 (“Fifth 706 Comments”).

communication.”²⁰ A more recent Commission technical paper found that “advanced users accessing applications such as enhanced two-way videoconferencing and HD video streaming could require actual symmetric [] speeds of 5 Mbps or more.”²¹ Thus, the Commission’s current definition, which has an upstream threshold of 1 Mbps is wholly insufficient. Any definition must ensure that both the overall capability in *each direction* is sufficient to perform the functions outlined by Congress *and* that this minimal threshold apply to content consumers both “originate and receive.” Congress made no distinction between upstream and downstream capabilities and neither should the Commission.

The current inferior and asymmetric minimum speed requirements prevent the Commission from accurately determining the number of users that receive these capabilities. The speeds offered to consumers should by no means be expected to be symmetrical. However, for the purposes of a Section 706 determination, both upstream and downstream capabilities must meet the *minimum threshold* to ensure they enable the two-way functionalities described by Congress. The recent Form 477 data shows that only *3 percent* of connections have an advertised upload speed of 3 Mbps or higher, and only *0.3 percent* have advertised upstream capabilities of 6 Mbps or higher.²² Thus, it is clear that the overwhelming majority of consumers are not experiencing upstream speeds that include the capabilities necessary to meet Congress’ intent.

²⁰ Federal Communications Commission, *Connecting America: The National Broadband Plan*, Omnibus Broadband Initiative, March 16, 2010, p. 170 (“*National Broadband Plan*”). The Plan also estimated that a “2-way video teleconference” required 5.5 Mbps of downstream speed (p. 17). It is reasonable to assume that this two-way application requires similar upstream speeds.

²¹ Federal Communications Commission, “Broadband Performance,” OBI Technical Paper No. 4, p. 4 (“*Broadband Performance*”).

²² *477 Report* at Table 9.

The Commission should also ensure that, to the best extent possible, the actual speeds typically being experienced by consumers are taken into account.²³ Congressional language is clear that they were concerned with whether these tasks could be undertaken by users, not whether they subscribed to a connection that only claimed they could do so. The estimate relied on in the *Sixth Report* accounted for this factor. The Commission's recent technical paper on broadband performance found that "actual download speeds experienced by U.S. consumers appear to lag advertised speeds by roughly 50 percent."²⁴ This finding confirms the necessity of considering real-world speeds vs. those simply claimed in promotional materials when determining the tenets of Section 706.

Another consideration the Commission should take into account is the growing prevalence of multi-user homes.²⁵ Congress focused on "users", not subscribers, in defining advanced telecommunications capability. The Commission's determination should embody this focus. A typical household now includes numerous users and devices that connect to the Internet via wired or home wireless connections. This environment includes multiple computers, Internet-connected electronics (such as TVs, gaming systems or set-top boxes), smartphones, femtocells and many other wi-fi enabled devices. The ability for "users to originate and receive high-quality voice, data, graphics, and video telecommunications" is directly related to such an

²³ We offered similar recommendations in the previous Section 706 proceeding. *See Sixth 706 Comments* at 15-17.

²⁴ *Broadband Performance* at 12.

²⁵ *See also Sixth 706 Comments* at 14-15.

environment.²⁶ Furthermore, each user increasingly engages in multiple simultaneous uses of a single connection.²⁷

The Commission must also consider the price of subscribing to such capabilities.²⁸ Congress clearly viewed affordability as an important component of this determination.²⁹ This should include equipment pricing and contract length. Pricing has a direct bearing on the availability of services to consumers. For instance, Time Warner Cable has only seen a very small number of customers adopting their higher tiers in the few areas they are offered. This is likely due to the \$100 monthly price tag.³⁰

Going forward, the Commission should rely on broadband subscribership and availability information collected directly by the Commission. To do so, the Commission must act on its long overdue promise to expand Form 477 data collection to include availability information -- of which the fourth-month deadline expired nearly two years ago.³¹ With this information, the Commission can determine the speeds available to consumers and the speeds consumers' purchase. Relying on the Commission's ongoing speed testing will offer insight into the actual

²⁶ 47 U.S.C. § 1302(d)(1).

²⁷ Indeed, AT&T and Apple have made using numerous applications simultaneously a selling point with the iPhone - a device with far less computational power and bandwidth than a home computer with a wireline connection. *See e.g.* Gregg Keizer, "New iPhone ads stick up for AT&T," *ComputerWorld*, Nov. 24, 2009.

²⁸ *NOI* at para. 9.

²⁹ *Sixth 706 Comments* at 7-9.

³⁰ *See e.g.* Jeff Baumgartner, "Time Warner Cable's Next Docsis 3.0 Targets," *Light Reading*, Feb. 11, 2010.

³¹ *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9710 (2008).

speeds as compared to promotional speed claims.³² With the inclusion of price information, the Commission will gain unprecedented insight into the extent to which Congress' vision is being met.

As noted above, we identify numerous areas for improving the Section 706 determination to better fit the Congressional directive. Nonetheless, the Commission should be applauded for bucking the historical trend and stating the obvious: advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.

Respectfully Submitted,

_____/s/_____

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³² See e.g. Dave Vorhaus, "A New Way to Measure Broadband in America," *Blogband*, April 9, 2010.